(7)

No. 91-1521

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

UNITED STATES OF AMERICA, Petitioner,

v.

LOWELL GREEN

On Writ of Certiorari to the
District of Columbia Court of Appeals

BRIEF FOR THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICI CURIAE SUPPORTING AFFIRMANCE

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INTERESTS OF AMICI

The Public Defender Service for the District of Columbia (PDS) is an independent agency established by Congress to provide legal assistance to

indigent persons charged with criminal offenses in the local and federal courts of the District of Columbia. D.C. Code §§ 1-2701, et seq. PDS therefore has an interest in protecting the exercise of the right to counsel recognized in Edwards v. Arizona, 451 U.S. 477 (1981). PDS participated as amicus curiae in the proceedings below.

The National Legal Aid and Defender Association (NLADA) is a private, non-profit national membership organization based in Washington, D.C. Its purpose is to assure the availability of quality legal services in criminal and civil cases to all persons unable to retain counsel. The membership of the NLADA includes most public defender offices around the country, as well as many assigned counsel and private

practitioners. Accordingly, the NLADA has a substantial interest in the preservation of the role of counsel in our adversary system of criminal justice.[1]

SUMMARY OF THE ARGUMENT

Petitioner's brief draws several factual distinctions between this case and Edwards v. Arizona, 451 U.S. 477 (1981), but it never offers a convincing, workable, and coherent rationale for the exception it seeks to the Edwards "bright line" rule. To paraphrase the court below, Pet. App. 15a, there is no "Leitfaden" leading through this Court's decisions to the result petitioner advocates.

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[1] The parties have consented to submission of this Brief. Rule 37.3.

In Edwards, this Court held "an accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 485. The rule is clear and concise. Twice this Court has rejected arguments that it should restrict the Edwards holding based upon factual distinctions like those pressed by the government here. Arizona v. Roberson, 486 U.S. 675 (1988)(reinterrogation concerned a different case); Minnick v. Mississippi, 111 S.Ct. 486 (1990) (defendant had an opportunity to consult with counsel before reinterrogation). "The merit of

the Edwards decision lies in the clarity of its command and the certainty of its application. . . . 'This gain in specificity, which benefits the accused and the state alike, has been thought to outweigh the burdens [Edwards] imposes on law enforcement agencies and courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.'" Minnick, 111 S.Ct. at 490 (quoting Fare v. Michael C., 442 U.S. 707, 718 (1979)).

Petitioner principally relies upon Lowell Green's guilty plea as a "break in the chain of events" from the assertion of his right to counsel to his interrogation in January 1990. Pet. Br. 15 (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)). A guilty plea,

however, does not have significance for the analysis in Edwards. It is neither a waiver of the right protected by Edwards nor the functional equivalent of "initiation" by the accused.

Despite his guilty plea, Green retained the right to refuse to answer questions about the drug case to which he pled guilty, or any other subject which might tend to incriminate him. A defendant who pleads guilty to an offense does not agree by so doing to submit to custodial interrogation about that offense without the assistance of counsel. A fortiori, a guilty plea does not waive a previously asserted right to have counsel present during questioning about unrelated matters.

A guilty plea also does not "reopen[] the dialogue with the

authorities," Edwards, 451 U.S. at 486 n.9. It is not evidence that an accused who has previously expressed the need for help in withstanding the pressures of custodial interrogation no longer desires the advice of counsel. For these reasons, the entry of a guilty plea has no effect on the Edwards rule.

In addition to proposing a categorical exception to Edwards for interrogations after guilty pleas, petitioner recites several factual circumstances which, it contends, would make application of the Edwards rule here inconsistent with its purpose. Pet Br. 7, 10, 25. The accumulation of these facts does not change the result dictated by Edwards. Every "bright line" rule applies to a range of circumstances. Miranda v. Arizona, 384 U.S. 436 (1966),

requires warnings even if the arrestee is a police officer, a lawyer, or a judge. Edwards cannot survive as a lucid and intelligible rule for the police if courts are invited, as they would be in every case, to make ad hoc policy judgments about whether to follow Edwards. See Pet. Br. 13, 25. Minnick, 111 S.Ct. at 492, Roberson, 486 U.S. at 681-82.

Moreover, Green had been charged with murder by complaint at the time the police interrogated him. As a result, the government had already moved from the investigatory phase - where the police seek information from a suspect which may inform a charging decision - to the prosecutorial phase - where interrogation is used to build the government's case against the defendant. Once "the adverse

positions of government and defendant have solidified," United States v. Gouveia, 467 U.S. 180, 189 (1984), as they had in this case, the dangers of undue coercion during interrogation increase, adding to the need for strict adherence to Edwards.

ARGUMENT

EDWARDS v. ARIZONA REQUIRES SUPPRESSION OF GREEN'S STATEMENT.

A. The Court Has Committed Itself to a "Clear and Unequivocal" Rule.

In Edwards, this Court unanimously agreed that Edwards' confession should be suppressed. The majority articulated a straightforward bright-line, prophylactic rule. Like the requirement for Miranda warnings, this rule "has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogations are not admissible." Minnick v. Mississippi, 111 S.Ct. at 490 (quoting Fare v. Michael C., 442 U.S. 707, 718 (1979)). "The merit of the Edwards decision lies in the clarity of

its command and the certainty of its application." Ibid. The Court "has repeatedly emphasized the virtues of a bright-line rule." Michigan v. Jackson, 475 U.S. 625, 634 (1986); Smith v. Illinois, 469 U.S. 91, 98 (1984); Solem v. Stumes, 465 U.S. 638, 646 (1984).

A "clear and unequivocal" rule, Minnick, 111 S.Ct. at 492, is desirable for at least three reasons. First, it makes clear to the police how to respond to invocations of the right to counsel. Since the rule is designed to prevent "badgering," Michigan v. Harvey, 110 S.Ct. 1176, 1180 (1990), it is important to leave little room for interpretation or evasion in the stationhouse. Second, an unequivocal rule is easier for trial courts to apply. Rather than a "presumption" which may be challenged by

the unique facts of any case, the Edwards rule is a standard of conduct which is relatively easy for a trial court to enforce. Third, on the appellate level, a bright-line rule achieves greater consistency than an approach based upon a "totality of the circumstances."

Petitioner seeks an exemption from the bright-line Edwards rule for this case, but never makes clear how broad or narrow that exemption would be. This approach substitutes an ad hoc "totality of the circumstances" test for the Edwards rule. To the extent petitioner's real quarrel is with Edwards and, more generally, with prophylactic rules to protect constitutional rights, it has made these arguments before, and they

should be rejected again.[2]

B. Lowell Green's Guilty Plea Did Not Constitute a Waiver of His Privilege Against Self-Incrimination and Was Not the Functional Equivalent of Initiation.

On July 18, 1989, Lowell Green, then eighteen years of age, was given a Metropolitan Police Department advice of rights form. He answered "yes" to three questions: "Have you read or had read to you the warning as to your rights;" "Do you understand these rights;" and "Do you wish to answer any questions." His answer to the fourth question, "Are you willing to answer questions without having an attorney present," was "no." This answer "expressed his desire to deal with the police only through counsel," Edwards, 451 U.S. at 485, and "expressed his own view that he [was] not competent

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[2] Petitioner participated as amicus in both Roberson and Minnick.

to deal with the authorities without legal advice." Arizona v. Roberson, 486 U.S. at 681 (quoting Michigan v. Mosley, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring in result)). See Smith v. United States, 529 A.2d 312, 314 n.2 (D.C. 1987).

Nothing in the record suggests that Lowell Green limited his assertion of his right to counsel in any way. Nothing in the record suggests that his reason for requesting the assistance of counsel was limited to the drug charge for which he had been arrested. Just as a waiver would have been construed to permit questioning about any subject -- including the murder of Cheaver Herriott -- his assertion of the right to counsel must be construed as a refusal to discuss any matters with the police except in the

presence of counsel. Arizona v. Roberson, 486 U.S. at 684. As the Court said in Roberson, "there is no reason to assume that a suspect's state of mind is in any way investigation-specific." 486 U.S. at 684. Indeed, Green's initial refusal to speak to the police without a lawyer may have been prompted by his fear of blurting out information about a murder rather than reluctance to discuss the drug offense for which he was arrested. This Court's decision in Edwards requires the suppression of statements Mr. Green made during custodial interrogation without the benefit of counsel whose assistance he had requested during the course of questioning he had not initiated. Edwards, 451 U.S. at 485.

1. A guilty plea is not a "waiver" of the right to the aid of counsel during questioning.

Petitioner contends that Green's guilty plea in the drug case makes Edwards inapplicable to the murder case. Pet. Br. 15-17. .This argument mischaracterizes the legal and factual implications of a guilty plea and ignores the significance of the Court's decision in Roberson.

This Court said in Tollett v. Henderson, 411 U.S. 258 (1973), that a guilty plea extinguishes a defendant's right to raise constitutional claims which might have been available if the defendant had gone to trial.[3] This means

[3] This is the sense in which waiver is used in Boykin v. Alabama, 395 U.S. 238, 243 (1969). A defendant who pleads guilty also expressly waives certain rights under Fed. R. Cr. P. 11, or its Superior Court counterpart. McCarthy v. United States, 394 U.S. 459, 466 (1969). This express waiver does not include the right at issue here.

that by pleading guilty a defendant loses the opportunity to challenge most pre-existing constitutional errors. This does not mean, however, that a defendant, by pleading guilty, has surrendered protection against future violations of his or her constitutional rights. See Minnesota v. Murphy, 465 U.S. 420, 426 (1984) (even conviction does not preclude assertion of Fifth Amendment privilege).

Unless a plea agreement expressly provides for cooperation with the government, a guilty plea is not a "waiver" of the right to have counsel present during custodial interrogation. Generally, a guilty plea is not even a waiver of the right not to incriminate oneself. Superior Court Rule 11(c), which is substantively identical to Fed. R. Cr. P. 11(c), requires the court to

advise the defendant "[t]hat he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself" (emphasis added). As a general matter, defendants who enter guilty pleas give up their right to assert the privilege at trial because "there will be no trial." See 1 FEDERAL JUDICIAL CENTER, BENCH BOOK FOR UNITED STATES DISTRICT JUDGES 1.06-8-9 (3d ed. 1986); Sup. Ct. Cr. R. 11(c)(4). A plea is treated as a substitute for a trial and as a waiver of any rights which would be exercised during trial. A guilty plea therefore has no greater

effect on a defendant's Fifth Amendment privilege than a guilty verdict.[4]

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[4] In general, "[a] convicted but unsentenced defendant retains his Fifth Amendment rights." United States v. Lugg, 892 F.2d 101, 102 (D.C. Cir. 1989)(witnesses who had entered guilty pleas retained privilege not to testify about offense of conviction); United States v. Houghton, 554 F.2d 1219, 1222 (1st Cir. 1977), cert. denied, 434 U.S. 851 (1977) (acceptance of guilty plea would not constitute a waiver of Fifth Amendment privilege, privilege continued "at the very least" until sentencing); United States v. Trejo-Zambrano, 582 F.2d 460, 464 (9th Cir.), cert. denied, 439 U.S. 1005 (1978); United States v. Miller, 771 F.2d 1219, 1235 (9th Cir. 1985); Meehan v. State, 397 So.2d 1214, 1215 (Fla. App. 1981) (right against self incrimination continues after conviction until sentencing). But see Brown v. Butler, 811 F.2d 938, 940 (5th Cir. 1987) (rejecting claim that Miranda warnings were required before presentence interview because "[b]y pleading guilty, Brown waived the privilege against compulsory self-incrimination guaranteed by the fifth amendment").

In Estelle v. Smith, 451 U.S. 454 (1981), the Court held that the admission of psychiatric testimony in the penalty phase of a capital trial violated the defendant's Fifth and Sixth Amendment rights. The Court rejected the State's argument that incrimination ended with an adjudication of guilt. 451 U.S. at 462. The Court did not decide whether "the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination." 451 U.S. at 469 n.13.

The courts have generally concluded that Miranda warnings are not required before routine presentence interviews by court probation officers. United States v. Cortes, 922 F.2d 123, 126 (2d Cir. 1990); Baumann v. United States, 692 F.2d 565, 576 (9th Cir. 1982); United States v. Jackson, 886 F.2d

A guilty verdict or a guilty plea does not extinguish a defendant's Fifth Amendment privilege even with respect to the offense of conviction. Pet. App. 13a. It follows that a finding of guilt of one offense does not deprive a defendant of the right to refuse to answer questions about other offenses.[5]

838, 842 n.4 (7th Cir. 1989); United States v. Rogers, 912 F.2d 975, 979 (10th Cir.), cert. denied, 111 S.Ct. 113 (1990); United States v. Davis, 919 F.2d 1181, 1186-87 (6th Cir. 1990); Limp v. State, 457 N.E.2d 189, 191 (Ind. 1983); People v. Bachman, 127 Ill. App. 3d 179, 82 Ill. Dec. 270, 468 N.E.2d 817, 822 (Ill. App. 1984); People v. Daniels, 149 Mich. App. 602, 386 N.W.2d 609, 613 (Mich. App. 1986). Most of these cases assume, however, that the Fifth Amendment privilege applies to these presentence interviews. There may be many aspects of an offense which could lead to an increased sentence, so that a defendant could not be compelled to give a full account of an offense, even after pleading guilty, without violating the Fifth Amendment.

[5] By pleading guilty, "a witness does not lose his Fifth Amendment right to refuse to testify concerning other matters or transactions not included in his conviction or plea agreement." United States v. Tindle, 808 F.2d 319, 325 (4th Cir. 1986), cert. denied, 490 U.S. 1114 (1989); accord United States v. Johnson, 488 F.2d 1206, 1209-10 (1st Cir. 1973); United States v. Ramos, 810 F.2d 308, 314 (1st Cir. 1987); United States v. Domenech, 476 F.2d 1229, 1231 (2d Cir.), cert. denied, 414 U.S. 840 (1973); United States v.

Defendants are not advised that, by pleading guilty, they give up any future right to refuse to answer questions about the offense of conviction,[6] much less

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Yurasovich, 580 F.2d 1212, 1218 (3d Cir. 1978); United States v. Lyons, 703 F.2d 815, 818 n.2 (5th Cir. 1983); United States v. Damiano, 579 F.2d 1001, 1002 (6th Cir. 1978); United States v. Moore, 682 F.2d 853, 856 (9th Cir. 1982).

[6] The court is required to advise the defendant that "[i]f the Court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his answers may later be used against him in a prosecution for perjury or false statement." Sup. Ct. Cr. R. Rule 11(c)(5)(emphasis added). However, unlike a statement made following a true waiver of a defendant's protection against self-incrimination, a defendant's acknowledgement of guilt during a plea proceeding is not admissible if the guilty plea is later withdrawn. Rule 11(e)(4)(C). The record does not show whether Green made any statement when he entered his guilty plea in the drug case.

Moreover, the general rule is that a waiver of the privilege in one proceeding -- such as a plea hearing -- does not preclude the assertion of the privilege in a subsequent proceeding. In re Neff, 206 F.2d 149, 152 (3d Cir. 1953); United States v. Smith, 940 F.2d 710, 713 (1st Cir. 1991); United States v. Miranti, 253 F.2d 135, 139 (2d Cir. 1958); United States v. Goodman, 289 F.2d 256, 259 (4th Cir.), vacated, 368 U.S. 14 (1961); United States v. Ballantyne, 237 F.2d 657, 665 (5th Cir. 1956); United States v. Licavoli, 604 F.2d 613, 623 (9th Cir. 1979), cert. denied, 446 U.S. 935 (1980). See also United States v. Miller, 904 F.2d 65, 69 (D.C. Cir. 1990) (recognizing that D.C. Circuit holds "minority view").

that they are surrendering the right to have counsel present during custodial interrogation by the police. Indeed, the mandatory advice to a guilty pleading defendant includes a continuing right to the assistance of counsel, Sup. Ct. Cr. R. 11(c)(2). It follows a fortiori that a guilty plea in one case has no effect whatsoever on the previously asserted right to have counsel present during questioning about different offense. Even if, as petitioner argues, a guilty plea amounted to a waiver, the scope of the waiver would be narrower than the original assertion of the right to counsel, which was not "investigation - specific." Arizona v. Roberson, 486 U.S. at 684. Petitioner's discussion of Green's guilty plea omits any reference to Roberson, obscuring the disparity

between the scope of the putative waiver and the scope of the assertion.

Nothing in this record shows that Lowell Green waived any rights at all. All the record shows is that he offered a guilty plea, which a Superior Court judge accepted. The government did not argue waiver based upon the guilty plea in the trial court, and did so for the first time on appeal. The most this Court should presume from this silent record is a limited waiver complying with Rule 11 which in no way implicates the Edwards right to counsel during custodial questioning.[7]

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[7] As the Court observed in McNeil v. Wisconsin, 111 S.Ct. 2204, 2209 (1991), the assertion of Sixth Amendment right to counsel is not an assertion of the Fifth Amendment right "as a matter of fact." Likewise, "as a matter of fact" the limited waiver of rights in the course of a guilty plea is not a waiver of the Edwards right.

2. A guilty plea does not imply a willingness to communicate directly with the police which is equivalent to initiation by the accused.

The Court said in Edwards that interrogation is permissible after a suspect requests counsel only if counsel is present or if the defendant initiates a conversation with the police about the offense. 451 U.S. at 485. When a suspect who has previously requested a lawyer "evince[s] a willingness and a desire for a generalized discussion about the investigation," Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983), the need for prophylactic measures against coercion is diminished. The reason for this is that by reopening a dialogue with the authorities, the subject of the interrogation repudiates a previously expressed "desire to deal with the police only through counsel." Edwards, 451 U.S.

at 485. Initiation cancels out a previous assertion of the Fifth Amendment right to counsel because it concerns precisely the same point: whether an accused is willing to talk to the police without a lawyer.

A guilty plea is not the functional equivalent of initiation. Petitioner acknowledges "that a guilty plea is not necessarily inconsistent with a continuing desire to deal with the government only through counsel," Pet. Br. 16, that is, a guilty plea is fully consistent with a continuing assertion of Edwards rights. It does not, as a factual matter, reflect any renewed willingness to brave the pressures of custodial interrogation. A defendant who has entered a guilty plea and is pending sentencing may be particularly vulnerable

to pressure to "cooperate" with the authorities by answering questions. See Roberts v. United States, 445 U.S. 552, 557-560 (1980)(sentence may be enhanced for failure to cooperate with the authorities; no showing in this case that the defendant's silence was "protected by the privilege against self-incrimination"). Nor does a guilty plea imply any agreement to forego the advice or presence of counsel. Green was represented by a lawyer during and after his guilty plea in the drug case.[8]

Because, as the government admits, a guilty plea does not signify a change of heart about a defendant's willingness to forego the help of a lawyer, approaching

[8] Because of Green's Sixth Amendment right to counsel, it clearly would have been impermissible for the police to question him for purposes of gathering information to enhance his sentence. Estelle v. Smith, 451 U.S. at 470-72.

a defendant after a guilty plea or a guilty verdict, see Pet. Br. 17, "and seek[ing] to determine if he would now like to speak with [the police] about an unrelated offense," Pet. Br. 18, presents exactly the same dangers of coercion as approaching a defendant about an unrelated offense before a guilty plea. Even after a guilty plea, "a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." Roberson, 486 U.S. at 681 (quoting Michigan v. Mosley, 423 U.S. 96, 110 n.2 (1975)(White, J., concurring in the result)). This Court has already said in Roberson, that an assertion of the right to counsel forecloses custodial questioning, even about an unrelated offense. The government does not

challenge Roberson, and it controls this case.

The government eventually retreats to a "broader point: the irrebuttable presumption from Edwards should not apply when there is a significant change in the accused's status prior to the interrogation." Pet. Br. 17. But petitioner fails to justify creating an exception to Edwards because it cannot show that a guilty plea is a change of status inconsistent with the purposes of the Edwards rule.

C. The Other Distinguishing Factors Petitioner Cites Do Not Make Edwards Inapplicable to this Case.

Petitioner identifies three facts in addition to Green's guilty plea which it claims take this case out of the ambit of Edwards. But petitioner does not propose a "clear and unequivocal" rule of conduct

which accounts for these facts. Instead, petitioner's argument leads to an ad hoc approach which cannot be squared with Edwards, Minnick and Roberson. A bright-line rule must be justified by a purpose, but this does not mean that the rule should be re-examined each time it is applied. In any event, the rationale of Edwards applies even after consideration of all of the facts petitioner cites.

The length of time between Green's assertion of his right to counsel and the renewed interrogation does not offer a principled basis for a decision in this case.[9] Petitioner ignores the need for

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[9] This does not mean, however, that an assertion of the right to counsel would extend to offenses committed after the assertion, since a suspect would have no reason to expect to be questioned about criminal conduct which has not yet occurred. For this reason, there is no need to impose a time limit on Edwards in order to justify the result in United States v. Hall, 905 F.2d 959, 962 (6th Cir. 1990), cert. denied, 111 S.Ct. 2858 (1991) (threatening letter sent after Hall was appointed counsel in unrelated state matter). In

clarity in this area of the law. Its brief proposes no predictable standard to determine how long is too long. See Pet. Br. 20-22 (more than a "few days"). Moreover, an extended period of time in custody may increase, rather than diminish, the coercive pressures to comply with custodial interrogation. Minnick, 111 S.Ct. at 491. Prisoners are expected to answer the questions of those in authority, see Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (privilege

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any event, Hall is controlled by McNeil v. Wisconsin, 111 S.Ct. 2204 (1991), rather than Edwards.

State v. Newton, 682 P.2d 295, 298 (Utah 1984), the other case the government cites as support for a temporal limit on the assertion of the right to counsel, Pet. Br. 22 n.7, misinterpreted Edwards. The Newton court said "the rule established in Edwards is not a per se rule, but requires a consideration of the totality of the circumstances to determine if a defendant should have been re-advised of his rights prior to additional questioning." Newton, 632 P.2d at 297. Newton erroneously applied the "scrupulously honor" standard of Michigan v. Mosley, rather than requiring initiation under Edwards.

against self-incrimination does not apply to prison disciplinary proceedings), and become inured to the loss of privacy and dignity which attends incarceration. See Bell v. Wolfish, 441 U.S. 520 (1979); Block v. Rutherford, 468 U.S. 576, 589-91 (1984); Hudson v. Palmer, 468 U.S. 517, 528 (1984). For these reasons, a prisoner may be especially susceptible to coercion during custodial questioning.

The interrogation conducted in this case also placed pressure on Green beyond the normal consequences of incarceration. Unlike a prisoner questioned by a cellmate in his own familiar quarters, see Illinois v. Perkins, 110 S.Ct. 2394, 2397 (1990), Green was interrogated by detectives on the quintessentially coercive ground of the stationhouse. See Brief of the United States as Amicus

Curiae at 11, Illinois v. Perkins, (No. 88-1792). While incarcerated at the Youth Center, Green would have been notified of a "visit" by police officers, and would have had the right to refuse to see them, or to contact his attorney. In contrast, when he was transported to the Homicide Branch, he lacked even this degree of freedom. Like Minnick, Green was denied the choice whether to meet with his interlocutors. Minnick, 111 S.Ct. at 488.

The other factors petitioner highlights, interrogation about a different case and the fact that Green had counsel appointed for him in the drug case, are no more persuasive in combination than they were singly in Roberson and Minnick. There is even less reason to believe that consultation with

a lawyer appointed in a different case would be "effective in instructing the suspect of his rights," Minnick, 111 S.Ct. at 491, than there was in Minnick. Indeed, there is nothing in this record to suggest any consultation between Green and his counsel concerning the murder charge.

The fact that Lowell Green already had a lawyer before he was questioned cuts against petitioner. The right Green asserted was the right to have counsel present during questioning; he did not refuse to talk to the police as long as they gave him a lawyer. By questioning him without contacting the lawyer who already represented him, the police failed to honor his request. The implicit message was that talking to the police with the assistance of counsel was

not really an option.

D. Strict Adherence to Edwards is Required Once a Decision to Prosecute the Accused Has Been Made.

Edwards should be applied to this case because the interrogation here violated the central purpose of the rule. "Preserving the integrity of an accused's choice to communicate with the police only through counsel is the essence of Edwards and its progeny." Patterson, 487 U.S. at 291. "This Court has consistently emphasized and, more importantly, has stood fast to ensure the essential premise underlying our entire system of criminal justice that 'ours is an accusatorial and not an inquisitorial system - a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an

accused out of his own mouth.'" United States v. Mandujano, 425 U.S. 564, 587 (1976) (quoting Rogers v. Richmond, 365 U.S. 534, 541 (1961)).

The function of Edwards is to protect the "initial election" of an accused to seek the assistance of counsel, Patterson v. Illinois, 487 U.S. at 291, in his or her dealings with the police. Once a charging decision has been made, the officer conducting an interrogation has an even greater incentive to overcome that "initial election" in order to make the accused "the deluded instrument of his own conviction." Estelle v. Smith, 451 U.S. at 463.

Lowell Green was formally charged with murder on January 4, 1990, the day before he was interrogated, when the

United States Attorney filed a complaint in the Superior Court alleging that Green had committed a first degree murder.[10] See Moore v. Illinois, 434 U.S. 220, 228 (1977) (per curiam) ("The prosecution in this case was commenced under Illinois law when the victim's complaint was filed in court"). The filing of the complaint signalled a change from the investigative to the accusatory stage. The person named in a complaint is a "defendant," Sup. Ct. R. Cr. P. 4(c), 5(a). Like an indictment or information, a complaint is

[10] This Court declined to decide whether the Sixth Amendment right to counsel "attaches" when a complaint is filed in Minnick, 111 S.Ct. at 489, and in Edwards, 451 U.S. at 480 n.7. In this case, the Court of Appeals held, without elaboration, that there was "no issue of violation of defendant's right to counsel under the Sixth Amendment," Pet. App. 3a-4a n.1, and Green has not sought review of that holding. Regardless whether Green also had a Sixth Amendment right to counsel, the fact that a charging decision had been made transformed the interrogation from investigative fact-gathering to pretrial discovery. In the context of a case already slated for prosecution, even an exculpatory statement has significant value to the police.

a charging document which contains "a written statement of the essential facts constituting the offense charged." Rule 3. A complaint, together with the required affidavit, constitutes sufficient authority to hold a person in custody pending a preliminary hearing. Rule 5(d).

In Marrow v. United States, 592 A.2d 1042 (D.C. 1991), the Court of Appeals wrote, "[t]he process of obtaining an arrest warrant - which includes a judge's approval of charges designated by the United States Attorney and the filing of a complaint, supporting affidavit, and warrant in the warrant office ... assures that a decision to charge has been made by the United States Attorney, based upon probable cause, and that it is a matter

of court record." 592 A.2d at 1045.[11]

If so, then it follows once a complaint

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[11] Marrow was decided two weeks after Green. The District of Columbia Court of Appeals held that the filing of a complaint in the Superior Court warrant office completed the charging process so that a person under the age of eighteen who had been charged by complaint with an offense subject to adult criminal prosecution could also be charged as an adult with other offenses otherwise exclusively subject to the jurisdiction of the juvenile court. D.C. Code §§ 16-2301, 16-2307(h). In Marrow, the defendant was arrested for misdemeanor possession of cocaine, an offense normally within the exclusive jurisdiction of the Family Division. Following his arrest, however, the police discovered an outstanding warrant for assault with intent to murder, an offense for which Marrow was subject to prosecution as an adult. Marrow argued that the cocaine possession offense was not "subsequent" to his transfer for criminal prosecution, because he had not been "charged by the United States Attorney," D.C. Code § 16-2301(3), with the assault before committing the misdemeanor.

In Marrow, the government argued successfully that "'[c]harging' may be accomplished by the filing of a complaint." Brief for Appellee at 4, Marrow v. United States, (No. 89-1034) (D.C.). See also id. at 5 ("the court clearly indicated that charging takes place when a complaint is issued"). It pointed out that under D.C. Code § 23-113, the statute of limitations is tolled by the filing of an indictment, or an information, or if "a complaint is filed before a judicial officer empowered to issue an arrest warrant; Provided, that such warrant issued without unreasonable delay...." Id. at 6. Thus, the government treated the filing of a complaint as a "firm commitment" to prosecute. Compare Brief of the United States as Amicus Curiae at 21, Minnick v. Mississippi, (No. 89-6332) (suggesting "firm commitment" to prosecution required for Sixth Amendment).

is filed "the government has committed itself to prosecute, and ... the adverse positions of government and defendant have solidified." Maine v. Moulton, 474 U.S. 159, 170 (1985) (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984)).[12]

The police "circumvented" rather than honored Lowell Green's right to counsel. See Patterson v. Illinois, 487 U.S. at 302 n.2 (referring to Sixth Amendment right). On January 5, 1990 Lowell Green was transferred from the cellblock of the Superior Court building, where he was only steps away from the courtroom and the office responsible for assigning appointed counsel, to the

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[12] This conclusion is buttressed by the terms of the booking order authorizing the police to take custody of Lowell Green. The order was issued, "[u]pon a representation by the United States Attorney's Office that additional charges are to be brought against Lowell Green...." DX 1.

custody of the Metropolitan Police, on the basis of a "booking order" authorizing release "for the purpose of booking, fingerprinting, photographing and processing on a charge alleging a violation of 22 D.C. Code 2401 and at the conclusion thereof to return forthwith to [United States Marshal's] custody." "Booking" is not "part of the investigative effort. Instead it is a form of administrative processing that consists mainly of obtaining information 'required immediately to enable the police to book and arraign the suspect and [to set conditions of release].'" Brief for the United States as Amicus Curiae at 12, Pennsylvania v. Muniz, (No. 89-213). The police did not perform the limited booking procedure authorized by the court; they transported Green to

Homicide for interrogation. It is clear that the interrogation was not envisioned as a preliminary to an initial appearance in court, because the arrest warrant was not actually "returned" as executed until January 6, 1990, when Green was brought back to the courthouse and counsel was appointed for him. The police unfairly exploited the booking order as a license to bolster a prosecution with incriminating admissions while Green could have been making his initial appearance in court.

CONCLUSION

"Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of Edwards and its progeny ...." Patterson v. Illinois, 487 U.S. at 291. The rationale of Edwards applies with full vigor to these circumstances, because the police did not honor Lowell Green's desire for the assistance of counsel after he made his wishes known. The judgment of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted,

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